



## STATE OF WISCONSIN Division of Hearings and Appeals

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In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████ Respondent

DECISION

Case #: FOF - 170640

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Pursuant to petition filed December 7, 2015, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General to disqualify ██████████ from receiving FoodShare benefits (FS) one year, a telephonic hearing was held on Tuesday, January 19, 2016 at 02:45 PM.

The issue for determination is whether the Respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

**PARTIES IN INTEREST:**

Petitioner:

Representative: ██████████

Office of the Inspector General  
Department of Health Services - OIG  
PO Box 309  
Madison, WI 53701

Respondent:

██████████  
██████████  
██████████

█

**ADMINISTRATIVE LAW JUDGE:**

Mayumi Ishii  
Division of Hearings and Appeals

### **FINDINGS OF FACT**

1. On February 17, 2016, the Office of Inspector General (OIG) prepared an Administrative Disqualification Hearing Notice alleging that the Respondent, "provided false information in order to receive SNAP/FoodShare that she was not eligible for..." during the period of December 19, 2014 through May 31, 2015 and the period of July 1, 2015 through September 30, 2015. Though there was no specific

information in the notice regarding the receipt of dual benefits under the heading, “Summary of Violation and Evidence”, OIG sought to impose a ten year disqualification. (Exhibit 13)

2. On December 19, 2014, the Respondent filed a Request for Assistance, via telephone, specifically seeking Healthcare and FoodShare benefits. She apparently provided a household address on [REDACTED] Wisconsin. (Exhibit 1 – RFA Summary print out; Exhibit 3- Case Comments)
3. On December 31, 2014, the Respondent submitted a letter from the Social Security Administration, addressed to her at the [REDACTED] address. (Exhibit 5)
4. The Petitioner received FoodShare benefits from December 19, 2014 through May 31, 2015. (Exhibit 6)
5. On June 9, 2015, the Respondent completed an ACCESS on-line change report form, providing an address on [REDACTED], Wisconsin. (Exhibit 9)
6. On June 30, 2015, the Respondent completed an ACCESS on-line change report form, but no new information was provided. (Exhibit 10)
7. Also on June 30, 2015, the Respondent called the agency, because she was having difficulty completing her Six Month Report Form on-line. The Respondent was informed that her case closed, so she needed to fill out a new application, which she did that day, telephonically. (Exhibit 3)
8. Upon completion of the phone application, the agency took the Respondent’s telephonic signature, affirming the information she provided and indicating that she understood that, “There are penalties for giving false information or breaking the rules”. (Exhibit 2 – Print Application Registration print out)
9. On September 21, 2015, the Respondent contacted OIG and asked that her case be closed because she was no longer living in Wisconsin. (Exhibit 12 – Case Comments)
10. Petitioner received FoodShare benefits from July 1, 2015 through September 30, 2015. (Exhibit 6)
11. The State of [REDACTED] had an open food stamp case for an individual with the same name, date of birth and social security number as the Respondent. This individual received benefits in [REDACTED] from August 2014 through August 2015. (Exhibit 11 – EPIC Recipient Transaction History and FS Benefit History Print-Out)

## **DISCUSSION**

### *Respondent’s Non-appearance*

The Respondent did not appear for this hearing. This circumstance is governed by the regulation in 7 C.F.R. §273.16(e)(4), which states in part:

If the household member or its representative cannot be located or fails to appear at a hearing initiated by the State agency without good cause, the hearing shall be conducted without the household member being represented. *Even though the household member is not represented, the hearing official is required to carefully consider the evidence and determine if intentional Program violation was committed based on clear and convincing evidence.* If the household member is found to have committed an intentional program violation but a hearing official later determines that the household member or representative had good cause for not appearing, the previous decision shall no longer remain valid and the State agency shall conduct a new hearing. The hearing official who originally ruled on the case may conduct a new hearing. In instances where the good cause for failure to appear is based upon a showing of nonreceipt of the hearing notice, the household member has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. In all other instances, *the household member has 10 days from the date of the scheduled hearing to present reasons indicating a good cause for failure to appear. A hearing official must enter the good cause decision into the record.*

*Emphasis added*

The hearing in this case took place on January 19, 2016. The Respondent was advised of the date and time of the hearing, in an Administrative Disqualification Hearing Notice that was sent to her in [REDACTED] [REDACTED] indicated that OIG used the Respondent's last known address and that there was no returned mail.

The notice directed the Respondent to contact the ALJ with a phone number where she could be reached. The Respondent did not call in with a number. An attempt was made to reach the Respondent at the phone number listed in the file and a message was left with the Respondent's mother to call, if the Respondent had a reason for her failure to be available.

The Respondent did not appear at the hearing and the Respondent did not contact the Division of Hearings and Appeals within 10 days to explain her failure to appear. As such, it is found that the Respondent did not have good cause for her non-appearance.

*What is an Intentional Program Violation?*

7 C.F.R. §273.16(c) states that Intentional Program Violations "shall consist of having intentionally: 1) Made a false or misleading statement or misrepresented facts; or 2) Committed an act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any State statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of coupons, authorization card or any other reusable documents used as part of an automated delivery system (access device)."

The Department's written policy restates federal law, below:

**3.14.1 IPV Disqualification**

7 CFR 273.16

A person commits an Intentional Program Violation (IPV) when s/he intentionally:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

An IPV may be determined by the following means:

1. Federal, state, or local court order,
2. Administrative Disqualification Hearing (ADH) decision,
3. Pre-charge or pretrial diversion agreement initiated by a local district attorney and signed by the FoodShare recipient in accordance with federal requirements, or
4. Waiver of the right to an ADH signed by the FoodShare recipient in accordance with federal requirements.

*FoodShare Wisconsin Handbook, §3.14.1.*

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. However, any remaining household members must agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. 7 C.F.R. §273.16(b).

### *What is OIG's burden of Proof?*

In order for the agency to establish that a FoodShare recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit an intentional program violation per 7 C.F.R. §273.16(e)(6).

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence"(a.k.a. "more likely than not") used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases.

In Kuehn v. Kuehn, 11 Wis.2d 15, 26 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

*Wisconsin Jury Instruction – Civil 205* is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that "yes" should be the answer because of its greater weight and clear convincing power. "Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the "middle burden." The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that "it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable." 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4<sup>th</sup> ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that the elements have been shown.

### *The Merits of OIG's Case*

In the case at hand, the Office of the Inspector General (OIG) asserts that the Respondent violated the rules of the FoodShare Program by lying about her residence in order to receive food stamp benefits from two states between December 2014 and September 2015.

"A household shall live in the State in which it files an application for participation" in the food stamp program. 7 *CFR* §273.3(a)

Per 7 C.F.R. §273.16(b)(5), “an individual found to have made a fraudulent statement or representation with respect to the identity or place of residence of the individual in order to receive multiple food stamp benefits simultaneously shall be ineligible to participate in the Program for a period of 10 years.” *See also FoodShare Wisconsin Handbook, § 3.14.12*

With regard to the period of December 2014 through May 31, 2015, OIG has failed to establish that the Respondent received the requisite penalty warning, when she completed her Request for Assistance in December 2014. 7 C.F.R. §273.2(b)(1)(i) states that each application must contain information, in plain and prominent language, “that if any information is incorrect, food stamps may be denied to the applicant; and that the applicant may be subject to criminal prosecution for knowingly providing incorrect information...” OIG did not provide the application/application summary itself; there is no indication in the case comments that a telephonic signature was taken; OIG did not provide a Correspondence History Print Out; it did not provide a copy of the Enrollment and Benefits Booklet; nor did OIG include a copy of the script that is read to individuals when a telephonic signature is taken. As such, there is no evidence that the Respondent was given the requisite penalty warning when applying for benefits in Wisconsin in December 2014.

Though the Respondent was receiving benefits in [REDACTED] at the time she applied for benefits in Wisconsin in December 2014, OIG did not provide the application that she completed in [REDACTED], so again, there is no evidence that the Respondent received the requisite penalty warning, prior to May 31, 2015.

Without evidence that the Respondent received the penalty warning, there is insufficient evidence to prove an intentional violation of the food stamp / FoodShare regulations. One cannot intentionally violate a rule that one was not made aware of. Thus, OIG has not met its burden to prove, by clear and convincing evidence, that the Respondent committed an IPV between December 2014 and May 2015.

It should be noted that 7 C.F.R. §273.2(b)(1)(iii), also states that each application must have, “a statement to be signed by one adult household member which certifies, under penalty of perjury, the truth of the information contained in the application, including the information concerning citizenship and alien status of the members applying for benefits.” As discussed above, OIG did not provide any evidence of an actual or telephonic signature on the December 2015 Wisconsin application, nor did it provide evidence of any such signature on an application from [REDACTED]

Petitioner apparently completed a new application in Wisconsin on June 30, 2015. However, OIG did not provide the application summary, so there is no way to know for sure what the Respondent reported to the county agency. It does appear from Exhibit 2, that the county agency obtained a telephonic signature from the Respondent, but for unknown reasons, OIG failed to provide a copy of the recording. OIG did not provide a copy of the script used for providing telephonic signatures, so even though the Respondent might have indicated that she understood, “there are penalties for giving false information or breaking the rules”, it is unclear whether the agency worker fully explained what the potential penalties were and what the applicable rules were.

Again, OIG also failed to provide any applications from [REDACTED], so there is no way to know whether the Respondent was given the requisite warnings from [REDACTED]

Because there is no evidence that the Respondent was properly advised about both the rules of the program and the consequences of breaking those rules, OIG has not met its burden to prove, by clear and convincing evidence, that any violation committed by the Respondent was intentional.

#### **CONCLUSIONS OF LAW**

OIG has not met its burden to prove, by clear and convincing evidence, that the Respondent intentionally violated the rules of the FoodShare program from December 2014 through September 2015.

**NOW, THEREFORE**, it is

**ORDERED**

That IPV case number [REDACTED] is hereby reversed.

**REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR**

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

**APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

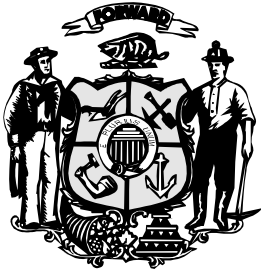
The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 18th day of February, 2016

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\sMayumi Ishii  
Administrative Law Judge  
Division of Hearings and Appeals

c: Office of the Inspector General - email  
Public Assistance Collection Unit - email  
Division of Health Care Access and Accountability - email  
[REDACTED] - email



## **State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on February 18, 2016.

Office of the Inspector General  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability  
[REDACTED]